

SERVED: March 11, 2005

NTSB Order No. EA-5144

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 10th day of March, 2005

APPLICATION OF	)	
	)	
GARY T. PORTERFIELD,	)	Docket Nos. 307-EAJA-SE-16754
LENNY G. ALAVA, and	)	306-EAJA-SE-16755
VAHAN D. KHOYAN,	)	and 305-EAJA-SE-16756
	)	
For an award of attorney fees	)	
and expenses under the	)	
Equal Access to Justice Act	)	
	)	

**OPINION AND ORDER**

The Administrator has appealed from the consolidated initial decision and order of Administrative Law Judge William E. Fowler, Jr., issued on June 25, 2003, granting each of the three applicants' petitions for attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.<sup>1</sup> For the reasons that follow, the Administrator's appeals are granted and the law judge's order granting fees and expenses is reversed.

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<sup>1</sup> A copy of the law judge's initial decision is attached.

### **Background**

In the underlying enforcement cases applicants<sup>2</sup> were charged with falsification prohibited by 14 C.F.R. §§ 61.59(a)(1) and (2),<sup>3</sup> and with lacking the good moral character required by § 61.153(c)<sup>4</sup> of the holder of an airline transport pilot (ATP) certificate. (Applicant Alava was also alleged to have violated 14 C.F.R. § 61.3(d)(2)(ii) and (iii).<sup>5</sup>) Specifically, the

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<sup>2</sup> Applicants were referred to as "respondents" in the earlier enforcement proceedings.

<sup>3</sup> **§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**

(a) No person may make or cause to be made:

(1) Any fraudulent or intentionally false statement on any application for a certificate, rating, authorization, or duplicate thereof, issued under this part [or];

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part.

<sup>4</sup> **§ 61.153 Eligibility requirements: General.**

To be eligible for an airline transport pilot certificate, a person must:

(c) Be of good moral character.

<sup>5</sup> **§ 61.3 Requirement for certificates, ratings, and authorizations.**

[N]o person other than the holder of a flight instructor certificate issued under this part with the appropriate rating on that certificate may -

(ii) Endorse an applicant for a ... [f]light instructor certificate or rating issued under this part; [or]

(iii) Endorse a pilot logbook to show training given.

Administrator alleged that the three had conspired to obtain certified flight instructor (CFI) certificates for Porterfield<sup>6</sup> and Alava<sup>7</sup> that were approved and issued by applicant Khoyan (who was, at that time, an FAA inspector), when the required ground and flight tests were not given or were not given properly. Among other things, the Administrator alleged that the times entered on the applications for the duration of the required ground and flight tests were false,<sup>8</sup> and that Alava was not qualified to instruct or endorse Porterfield, because Alava's CFI certificate was expired and had not been reinstated when he instructed and endorsed Porterfield.

After a 3-day evidentiary hearing, the law judge reversed the Administrator's orders of revocation, concluding that the applicants had not made any intentionally false statements. He stated, "I don't find any scienter<sup>9</sup> here [and] I don't find any false statement." The law judge further stated that the case "should never have been brought." However, in apparent

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<sup>6</sup> Porterfield received an initial CFI with single-engine, multi-engine, and instrument ratings.

<sup>7</sup> Alava received a reinstatement of his expired CFI with single-engine, multi-engine, and instrument ratings.

<sup>8</sup> The applications indicated that the duration of Alava's ground test was 1 hour and Porterfield's ground test was 2 hours. The applications also indicated that the duration of Alava's flight test was 1 hour, and Porterfield's flight test was 2.5 hours. In our earlier decision on the merits we incorrectly stated the flight test times claimed on the applications as 2.5 and 3 hours, respectively. Administrator v. Porterfield, et. al., NTSB Order No. EA-5020 at 3 (2003).

<sup>9</sup> "Scienter" is the knowledge component of an offense, and implies intent to engage in the prohibited conduct.

contradiction to this sentiment, he also found that the Administrator had made a prima facie case,<sup>10</sup> but that the case had been rebutted by the applicants' testimony and documentary evidence.

Applicants acknowledged at the hearing that the ground and flight testing times entered on the applications and attested to in other documents<sup>11</sup> were incorrect in that the combined flight tests for both Alava and Porterfield had only consumed about 1.5 hours of flight time. Uncontested documentary evidence showed that the airplane took off at 6:58 a.m., and had landed in time to be refueled at 8:30 a.m. They nonetheless asserted that the required tests had all been properly completed, thus disputing the FAA's expert testimony that the required testing could not possibly have been completed in the short amount of time available. The law judge apparently rejected this aspect of the FAA's expert testimony, finding that the tests were successfully completed.<sup>12</sup>

The full Board denied the Administrator's subsequent appeal

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<sup>10</sup> In light of this finding, we are puzzled by the law judge's subsequent statement in his decision granting EAJA fees that the Administrator did not establish a prima facie case.

<sup>11</sup> For example, Porterfield wrote two letters to the FAA in which he maintained that the flight portion of the test lasted 3 hours, consistent with what he and former Inspector Khoyan had claimed on his CFI application and in his pilot logbook.

<sup>12</sup> Despite the applicants' acknowledgment that the tests took less time than asserted on the applications, the law judge found that the durations of the ground and flight tests were the same as those written on the application. Transcript (Tr.) 1015-6.)

from the initial decision, noting that the law judge, "based on his view of the various witnesses' credibility, concluded that the [applicants] had not intended to falsify the applications." The Board added that its, "decision not to overturn the law judge's credibility assessment should not be read to suggest that we endorse his comment that the case 'should never have been brought.'"

The three EAJA applications followed and the law judge granted fees and expenses (although he modified the amounts requested by Khoyan and Porterfield), finding that the Administrator had pursued a "weak and tenuous" case. He concluded that the Administrator lacked substantial justification, and that she "had no facts or evidence to support her claim that the required tests were not given."<sup>13</sup>

In appealing these awards, the Administrator maintains that she was substantially justified in pursuing the case based on the evidence showing that the required tests could not possibly have taken place in the time available, and that the law judge's dismissal was based on a credibility determination in favor of the applicants' positions.<sup>14</sup> In their reply briefs, applicants

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<sup>13</sup> We note that the Administrator's complaints alleged that the required tests, "had not been given and/or had not been given properly."

<sup>14</sup> We have long held that where key factual issues hinge on witness credibility, the Administrator is substantially justified - absent some additional dispositive evidence - in proceeding to a hearing where credibility judgments can be made on those issues. See Administrator v. Caruso, NTSB Order No. EA-4165 (1994); and Administrator v. Martin, NTSB Order No. EA-4280 (1994).

contend that the law judge accepted their testimony and rejected the FAA inspectors' expert testimony, not on the basis of credibility, but because the inspectors (who worked in the same office where applicant Khoyan was previously employed) made factual mistakes and were biased, in particular against Khoyan, who apparently had some personnel issues related to his FAA employment. As discussed below, we grant the Administrator's appeal.<sup>15</sup>

### **Discussion**

For the Administrator's position to be found substantially justified it must be reasonable in both fact and law. That is, the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory.<sup>16</sup> We find that standard was met in this case.

All three applicants cite the following language from our decision on the merits in Administrator v. Fuller, et al., NTSB Order No. EA-4887 (2001) at 4, n.7, in support of their position that the Administrator was not substantially justified in relying on circumstantial documentary evidence in proceeding against them:

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<sup>15</sup> In light of this disposition, we need not address applicant Khoyan's appeal on the issue of whether the law judge applied the appropriate hourly rate to calculate his attorney's fee award.

<sup>16</sup> Administrator v. Conahan, NTSB Order No. EA-4276 at 2 (1994), citing U.S. Jet, Inc. v. Administrator, NTSB Order No. EA-3817 at 3 (1993); and Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct.2541 (1988).

We understand that it is beneficial for regulators to be alert to the possibility that documentary discrepancies could signal noncompliance with safety requirements. At the same time, we do not agree that a presumption of dishonesty should attach to every record-keeping inconsistency an inspector uncovers, and we believe it should be the exception, rather than the rule, that an intentional falsification charge would be filed, much less prosecuted as an emergency, without the suspected falsifier's having first been given some notice of a perceived problem and an opportunity to dispel any suspicion of misconduct it had engendered. In a related vein, we have previously advised the Administrator of our view that: "our law judges are not obligated to find that documentary evidence offered by the Administrator is more reliable than the testimonial evidence given by the author of such documents..." and that the Board does not "withhold the deference customarily afforded a law judge's credibility assessments simply because other evidence, of whatever description, arguably could have been given greater weight" (Administrator v. Crocker, NTSB No. EA-4565 (1997) at p. 6).

We continue to believe, as we said in Fuller, that it is generally advisable for the FAA to provide a suspected falsifier with an opportunity to explain his or her conduct before taking enforcement action. In fact, the Administrator did question all three applicants in this case before issuing the emergency orders. During the FAA's investigation into the circumstances surrounding the issuance of the disputed CFI certificates, each one was given an opportunity to explain the relevant events and circumstances.<sup>17</sup> Indeed, applicants Porterfield and Alava both provided explanations, including a timeline of events (which they later partially recanted after documentary evidence showed the duration of the flight could not have been as long as they

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<sup>17</sup> Specifically, the docket includes transcripts of depositions from January 16, 2002 (Alava); January 17 and July 19, 2002 (Porterfield); and October 28, 2002 (Khoyn).

maintained). Applicant Khoyan was also given the opportunity to explain his position prior to issuance of the orders of revocation, but he chose not to take advantage of that opportunity.<sup>18</sup>

Similarly, our observation in Fuller that law judges are not obligated to find documentary evidence more reliable than testimonial evidence of the authors of such documents does not imply that law judges cannot nonetheless properly make such a finding or that the Administrator is not substantially justified in proceeding to a hearing primarily on the basis of such documentary evidence. Given the significant documentary evidence apparently indicating that applicants engaged in a scheme to obtain improper certificates, including the evidence that there was insufficient time for the ground and flight tests to have been completed properly, the Administrator was justified in proceeding to a hearing.

The uncontested evidence showed that the airplane reportedly used for the flight tests was airborne for no more than 1.5 hours. Further, the Administrator also had evidence in the form of official sign-in/out sheets (albeit contested at the hearing) apparently indicating that applicant Khoyan was away from his FAA office on the morning in question for only approximately 1 hour

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<sup>18</sup> At his October 28, 2002, deposition, FAA counsel asked Khoyan a series of detailed questions about the events of August 10, 2001, including the hours he worked that day, whether and how long he flew the Cessna 414 on that day, and whether he conducted flight checks of Alava and Porterfield. He declined to answer any of the FAA's questions, citing his Fifth Amendment privilege against self-incrimination.



and 40 minutes. During this time period, according to the information entered on Alava's and Porterfield's CFI applications, he supposedly conducted 6.5 hours of testing (oral exams totaling 3 hours and flight checks totaling 3.5 hours), including eight instrument approaches at various airports.

One of the FAA's expert witnesses (an FAA inspector who is also a CFI) testified at the hearing that the notion of conducting three flight checks (Alava's CFI reinstatement, and Porterfield's multi-engine and instrument CFI ratings) in 1.5 hours was "ludicrous," and that a description of all the required maneuvers could not even be read in that amount of time, much less performed. (Tr. 973, 975, 980.) The Administrator could not have anticipated that the law judge would reject this testimony and instead credit applicants' testimony that the tests were properly completed in this limited amount of time, or that the law judge would find this testimony was sufficient to overcome the prima facie evidence of improper certification raised by the Administrator's evidence. The law judge did not explain his reason for rejecting the FAA inspectors' expert testimony, and we see no evidence to support applicants' contention that the law judge rejected it because the witnesses were biased and made factual mistakes.

Thus the Administrator's pursuit of emergency revocation was substantially justified with regard to all three applicants. In addition to the above reasoning, which applies to all three applicants, our decision is also based on the following analysis

of the Administrator's basis for proceeding against each individual applicant.

Applicant Khoyan

The Administrator alleged that Khoyan improperly issued CFI certificates to Porterfield and Alava. Khoyan certified on Porterfield's CFI application that on August 10, 2001, he had personally tested Porterfield in accordance with the pertinent standards and that the duration of those tests was 2 hours on the ground and 2.5 hours in flight. However, the Administrator had documentary and other evidence showing that this amount of time was simply not available.

Khoyan also certified on Alava's CFI application that he had personally tested Alava for 1 hour on the ground and 1 hour in flight, which the Administrator's evidence suggested was not possible in combination with the ground and flight tests of Porterfield he certified as also having taken place the same morning. Indeed, Khoyan acknowledged in his hearing testimony that the flight times were incorrect, and that time spent on Alava's flight test may have been as little as 15 minutes and the time spent on Porterfield's flight test was only 3/4th of the total flight time (which the uncontradicted evidence showed could have been no more than 1.5 hours).

The Administrator had further evidence of apparently improper certification in that Khoyan issued Porterfield a CFI certificate with single-engine and multi-engine ratings when no single-engine flight test was administered, and Porterfield had

admittedly not passed, or apparently even taken, the required knowledge tests for these ratings.<sup>19</sup> As an FAA inspector, Khoyan could reasonably be charged with an awareness of the required knowledge test requirements.

Accordingly, the Administrator had a reasonable basis in fact and law for alleging that Khoyan made false statements on applications and logbooks, contrary to 14 C.F.R. 61.59(a), and that he knowingly participated in the improper issuance of the CFI certificates to Alava and Porterfield.

#### Applicant Alava

The Administrator alleged that Alava played a role in the improper issuance of both Porterfield's and his own CFI certificate. Alava signed Porterfield's logbook as his instructor, certifying that on August 10, 2001, Porterfield received 3 hours of multi-engine time, 2.5 hours of instrument time, and flew eight instrument approaches. In his subsequent letter to the FAA and in his deposition testimony, Alava maintained that the duration of their combined test flights was 3 hours.<sup>20</sup> However, as discussed above, other evidence showed this

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<sup>19</sup> Two knowledge test result reports were proffered along with Porterfield's application: Fundamentals of Instruction and Flight Instructor Instrument Airplane. (See Exhibit A-7.)

<sup>20</sup> At the hearing Alava testified that Khoyan suggested that he should enter 3 hours in Porterfield's logbook for the duration of the flight. However, Alava did not provide this explanation when he was questioned about the entry at his January 16, 2002, deposition, 5 months after the flight. Further, even if he had, it would be reasonable for the Administrator to question it, and to assume that Alava would remember the duration of a flight test he had just completed.

could not possibly be true. In addition, Alava's certification on Porterfield's CFI application and logbook that he personally instructed Porterfield and considered him ready to take the CFI test was also suspect in that Alava's CFI certificate was expired and was arguably not officially reinstated until the conclusion of the ground and flight testing that morning. Therefore, the Administrator could reasonably argue that Alava was not qualified to give Porterfield these endorsements. Finally, as explained above, the Administrator had evidence indicating that insufficient time was available to properly conduct the numerous required ground and flight tests of both Alava and Porterfield.

Accordingly, the Administrator had a reasonable basis in fact and law for alleging that Alava made false statements on Porterfield's CFI application and in his logbook, contrary to 14 C.F.R. 61.59(a), and that Alava knowingly participated in the improper issuance of CFI certificates to Porterfield and himself.

#### Applicant Porterfield

The Administrator alleged that Porterfield was the recipient of an improperly issued CFI certificate. On Porterfield's CFI application, Khoyan indicated that he administered Porterfield a ground test lasting 2 hours and a flight test lasting 2.5 hours, and Porterfield made an entry indicating that his total time in the test airplane, all of which was acquired on the morning of August 10, 2001, was 3 hours. As explained above, other evidence indicated that there was insufficient time available for tests of this duration. When the Administrator questioned him about the

circumstances surrounding the issuance of his CFI, Porterfield steadfastly maintained that the flight time was 3 hours,<sup>21</sup> consistent with Khoyan's entries on his CFI application, and his and Alava's entries on his CFI application and in his logbook. The Administrator could reasonably regard this as an indication of Porterfield's knowledge and complicity in the incorrect time entries made by the others.

Further, Porterfield was issued a CFI certificate with both single- and multi-engine ratings when he clearly had not earned a single-engine rating because the flight test was given only in a multi-engine airplane. Porterfield also lacked the required CFI and multi-engine knowledge tests.<sup>22</sup> These circumstances lent additional support to the Administrator's position that his certificate was improperly issued.

Accordingly, the Administrator had a reasonable basis in fact and law for alleging that Porterfield caused Khoyan and Alava to make false statements on his CFI application and in his logbook, contrary to 14 C.F.R. 61.59(a), and that he knowingly participated in the improper issuance of his CFI certificate.

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<sup>21</sup> For example, in letters to the FAA dated December 6 and December 22, 2001, Porterfield reiterated that his combined instrument and multi-engine check rides took a total of 3 hours.

<sup>22</sup> The Administrator would be reasonable in assuming that, as an experienced pilot with multiple certificates and ratings, Porterfield would know that these requirements had not been met.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted; and
2. The law judge's consolidated initial decision granting the EAJA awards is reversed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and HEALING, Member of the Board, concurred in the above opinion and order. CARMODY and HERSMAN, Members, did not concur, and Member HERSMAN submitted the following comments.

Notation 7531B

Member Hersman, Commenting:

I am concerned about the precedent we seem to be setting with respect to EAJA cases and credibility determinations. The ALJs are properly charged with evaluating all aspects of cases; therefore their judgment regarding credibility is a significant matter. However, I do not believe the EAJA awards in this case hinge on credibility, as evidenced by the decision of Chief Judge Fowler to award the EAJA fees to the respondents.